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Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, *et al.*,
Appellants,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

MEMORANDUM OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET. AL.*, IN RESPONSE TO JURISDICTIONAL STATEMENTS

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees

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On February 18, 1986, three jurisdictional statements were filed by appellants Charles Bowsher, Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership of the House of Representatives, all appealing from the Order and Judgment entered by the three-judge court of the United States District Court for the District of Columbia on February 7, 1986. Appellees, Representative Mike Synar and eleven other members of the House of

Representatives, agree that this Court has jurisdiction over these appeals and that the questions presented are substantial. Accordingly, they agree that the Court should grant plenary review.

In finding that the trigger mechanism under the Balanced Budget and Emergency Deficit Control Act of 1985, Public Law 99-177 (the "Act"), was unconstitutional, the district court based its ruling on the fact that the delegation under the Act was made to a person subject to removal by Congress, and concluded that this delegation of an executive function to such a person violated principles of separation of powers. Appellees agree with that holding and will support it in this Court, although the principal defense of it will be made by the United States. Moreover, in the district court, appellees made two additional arguments that were not accepted below, but which they will argue in this Court pursuant to Rule 10.5 of the Rules of this Court.

1. Appellees intend to argue that the delegation here was unconstitutionally broad, regardless of whether the power was delegated to the Comptroller General or to an official who is concededly part of the Executive Branch. Unlike the delegations which this Court has upheld against similar challenges since *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this statute has several features which present a markedly different delegation issue. First, the driving engine of necessity—the inability of Congress to make hundreds or even thousands of individual decisions based on the particular circumstances of each case, which has led this Court to uphold broad delegations in other laws—is wholly lacking here. Not only has Congress previously made the very budget determinations that it is now delegating to three unelected officials (the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO"), and the Comptroller General), but it will continue to make them in the future. The difference is that under the Act the deliberations of these three officials, and not those of Congress, will determine the final spending figures in the budget. In short, the

only "necessity" that led to the Act was the necessity to avoid accountability for making spending reductions which were unpalatable to various constituents, a justification never before relied on to sustain a delegation of any kind, let alone one of this importance.

Second, the administrative determinations being made are hardly fact-finding in the ordinary sense of that term. Rather, they are highly judgmental predictions of the future course of the economy, on which Congressional budget decisions, not the administration of the laws, are ordinarily based. Moreover, there are no standards to be applied in making these predictions. Prior economic predictions issued by CBO and OMB to aid Congress and the President in making decisions about the budget cannot provide the necessary standards, since those predictions were used purely to give advice and were only one factor in the decision-making, whereas under the Act they will be the operative determinations that will decide the spending levels for the federal government.

Finally, the Act includes a provision, section 274(h), App. 118a, which is unprecedented in statutes creating broad delegations even approaching this: it completely insulates these key determinations from all judicial scrutiny. Not only does this underscore the essentially legislative nature of these predictions, but it results in the delegation of power to affect billions of dollars in federal spending, with not even the most minimal check on the exercise or nonexercise of such power. This factor and the others noted above form the principal bases for appellees' claim that the delegation here has so exceeded the limits upheld by this Court that it cannot stand, even if the power were given to the President himself.

2. Appellees also intend to argue that it is unnecessary for the Court to decide whether the delegation to the Comptroller General is impermissible under separation of powers principles, because the decision-making process established by the Act envisions a major substantive, non-advisory role for the Congressional Budget Office, which is admittedly an arm of the Congress. Thus, because the statutory scheme provides for a shared

administration of the law, involving both Executive and Legislative officials, the delegation impermissibly violates separation of powers principles, even if the Comptroller General were part of the Executive Branch.

On this issue, our principal dispute with both appellants and the United States is that they contend that the role of CBO (and, by necessary implication, that of OMB) is merely advisory, and hence the legislative status of CBO creates no constitutional difficulties. In our view the Act does far more than make CBO and OMB advisers to the Comptroller General. Instead, it creates a system which requires the close cooperation and joint effort of all three officials to produce the report on which the spending reductions are based. Coupled with the power of Congress to remove the Comptroller General, this statutory mechanism creates an improper role for the Legislative Branch in carrying out the Act, and thus violates principles of separation of powers.

For the foregoing reasons, the Court should note probable jurisdiction and consider all of the constitutional questions presented by the decision below.

Respectfully submitted,
Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees
Mike Synar, Member of Congress,
et al.

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